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Nos. 111- 113

In the SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

Nos. [redacted], and [redacted]

PHILLIPS PETROLEUM COMPANY,
Appellant,
VERSUS
THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, CERTAIN MINERAL OWNERS IN TEXAS COUNTY, OKLAHOMA, and NATURAL GAS PIPELINE COMPANY OF AMERICA,
Appellees.

PHILLIPS PETROLEUM COMPANY,
Appellant,
VERSUS
THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, CERTAIN MINERAL OWNERS IN TEXAS COUNTY, OKLAHOMA, and MICHIGAN-WISCONSIN PIPE LINE COMPANY,
Appellees.

PHILLIPS PETROLEUM COMPANY,
Appellant,
VERSUS
THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, CERTAIN MINERAL OWNERS IN TEXAS COUNTY, OKLAHOMA, and PANHANDLE EASTERN PIPE LINE COMPANY,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA.

MOTION OF APPELLEE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA TO DISMISS

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May, 1957.

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In the
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Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA.

MOTION OF APPELLEE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA TO DISMISS

Appellee, the Corporation Commission of the State of Oklahoma, pursuant to Rule 16 of the Revised Rules of this Court, moves to dismiss the appeals of Phillips Petroleum

Company in the above-entitled cases on the grounds (a) that the federal questions sought to be reviewed were not timely raised or expressly passed on; (b) that the position previously taken by Phillips with respect to this litigation and to Order No. 26096 estops Phillips from urging the issues which it now seeks to raise and such issues are accordingly not properly raised; and (c) that the Orders of the Oklahoma Supreme Court from which Phillips seeks to appeal rest on an adequate non-federal basis.

STATEMENT OF CASE

Appellant, Phillips Petroleum Company, hereinafter referred to as "Phillips", is a natural gas company and is a substantial producer of natural gas in the Guymon-Hugoton Field involved herein. In addition, Phillips has contracts with other producers in the field for the purchase of their gas at the wellhead, which it gathers, processes, handles and resells.

Order No. 26096 of the Corporation Commission of the State of Oklahoma, entered on July 29, 1952 (this order is set out in full as Appendix "C" to Phillips' Jurisdictional Statement) fixed a minimum price for sale of natural gas produced from the Guymon-Hugoton Field in Oklahoma as a condition to the production of gas from this area. This Order was divided into several parts, the first of which provided that no gas should be produced, if such gas was to be sold at the wellhead at a price of less than 9.8262 cents per m.c.f. and no gas should be produced if such gas to be sold off the lease or drilling unit or otherwise utilized at a

price equivalent to less than 9.8262 cents per m.c.f. at the wellhead. The latter portion of the Order (which was the only part of the Order involved in the appeals therefrom) provided that if gas is processed for extraction of liquid hydrocarbons and sold at the conclusion of processing, the price for the residue gas should not be less than 9.8262 cents per m.c.f.

Appeals from this Order were docketed in the Oklahoma Supreme Court in three companion cases (Nos. 35731, 35732 and 35734). These cases from the beginning were briefed, argued and considered on a single record. In the appeals to the Oklahoma Supreme Court (Opinion reported in 272 P.2d 425) and in the appeals to this Court (Cause Nos. 320, 321 and 322, October Term, 1954, Opinions reported at 349 U.S. 44, 75 Sup. Ct. 578, 349 U.S. 908, 75 Sup. Ct. 598; 349 U.S. 908, 75 Sup. Ct. 598) the appellants raised only the question of the validity of the Corporation Commission's Order insofar as it applied to the sales of *residue* gas made directly into an interstate pipeline at the outlet side of a gasoline plant after completion of production, gathering and processing. (Page 4 of Michigan-Wisconsin Pipe Line Company's and Natural Gas Pipeline Company of America's Joint Statement as to Jurisdiction in Causes Nos. 320 and 321, and pages 4 and 5 of Panhandle Eastern Pipe Line Company's Statement as to Jurisdiction in Cause No. 322, all in October Term, 1954). Phillips was not an appellant in these appeals, but instead participated as an appellee urging the validity of the Order.

This Court ruled (349 U.S. 44, 75 Sup. Ct. 578; 349 U.S. 908, 75 Sup. Ct. 598; 349 U.S. 908, 75 Sup. Ct. 598) that the

attempt by the Oklahoma Corporation Commission to fix a minimum price for appellants' purchases of residue gas was invalid. The opinion in Case No. 321 was rendered on April 11, 1955, and on the same day this Court rendered an opinion identical in language to that which it used in Case No. 321 in the case of *Natural Gas Pipeline Company* v. *Panoma Corp.*, 349 U.S. 44, 75 Sup. Ct. 576 (1955), a case which also dealt with the sale of residue gas to an interstate pipeline company at the outlet of a gasoline plant after the completion of production, gathering and processing. The opinions in Cases 320 and 322 were rendered on April 18, 1955, and were decided by reference to the *Panoma* case. In the *Panoma* case and in Case No. 321 this Court stated (75 Sup. Ct. 576 and 75 Sup. Ct. 578) that it was dealing with a situation where Oklahoma had attempted "to fix a minimum price to be paid for natural gas, after its production and gathering has ended by a company which transports the gas for resale in interstate commerce." This Court then stated that "such a sale and transportation cannot be regulated by a State but are subject to the exclusive regulation of the Federal Power Commission" (349 U.S. 44, 45); citing *Phillips Petroleum Co.* v. *Wis.*, 347 U.S. 672, 74 Sup. Ct. 794 (1954), a case which also involved sales of *residue* gas to an interstate pipeline company, which sales occurred at the outlet side of a gasoline plant after gathering and processing had been completed.

By its Orders on Mandate on October 8, 1956, and December 4, 1956 (these orders are set out in full as Appendix "A" of Phillips' Jurisdictional Statement filed on this appeal), the Oklahoma Supreme Court fully complied with

this Court's orders of reversal and set aside Order No. 26096 insofar as it pertained to the original appellants' purchases of *residue* gas. The Oklahoma Supreme Court justly refused, however, to go beyond this Court's order by invalidating that portion of Order No. 26096 which fixed a minimum price at the wellhead for gas produced in the Guymon-Hugoton Field of Oklahoma.

Phillips now urges that this Court's orders require that the wellhead portion of Order No. 26096 be invalidated, despite the fact that the validity of the wellhead part of the Order was never placed in issue before this Court or before the Supreme Court of Oklahoma in the initial appeals to that Court. This is the same Phillips who has urged, both in this Court and in the Oklahoma Supreme Court, the validity of even that portion of Order No. 26096 which fixed a minimum price for the original appellants' purchases of residue gas and who has stated that all parties are agreed that the Oklahoma Corporation Commission has the authority to prescribe the minimum price a producer must realize as a condition to production of gas (see page 10, Motion of Appellee Phillips Petroleum Company to Dismiss, October Term, 1954).

Of the three appellants making the original appeals to the Oklahoma Supreme Court and then to this Court, only one, Michigan-Wisconsin Pipe Line Company, has appealed from the action taken by the Oklahoma Supreme Court pursuant to the order of reversal of this Court. Indeed, all three of the Oklahoma Supreme Court's orders on mandate were issued in the same form as the proposed order which was submitted by Panhandle Eastern with its request for

mandate. (A copy of Panhandle Eastern's proposed order is attached hereto as Appendix "A"). Michigan-Wisconsin initially approved of the form of order on mandate proposed by Panhandle Eastern. It did not withdraw its approval until after the order on mandate had been entered, when it filed a brief in support of Phillips' petition for rehearing. At page 2 of that brief Michigan-Wisconsin explained that it had approved of the suggested form of order because "Michigan-Wisconsin was interested only at that time in obtaining relief from interference with contracts under which it purchased residue gas from Phillips"; and in a later brief filed in the Oklahoma Supreme Court on December 1, 1956, Michigan-Wisconsin explained that "It was the feeling of Michigan-Wisconsin that the only issue before the Supreme Court of the United States was whether the order was valid as applied to the operations of the appealing companies, and the proposed form of the order was accordingly so restricted." Thus, Michigan-Wisconsin has in effect conceded that the order on mandate as entered accomplishes the ends it sought to obtain in taking its original appeal to this Court. The reaction of the three successful appellants in the original appeals to this Court demonstrates with unimpeachable force that the Oklahoma Supreme Court properly and fully complied with this Court's orders of reversal. Nevertheless, Phillips, former advocate of the validity of Order No. 26096, by alleging a failure of the Oklahoma Supreme Court to comply with the orders of this Court, now seeks to raise new questions which are not and have never been involved in this litigation by urging that the wellhead portion of Order No. 26096 must be declared to be invalid.

Proposition I.

The Federal Questions sought to be reviewed were not timely raised or expressly passed on.

In the original appeals to the Oklahoma Supreme Court and in the original appeals to this Court, the parties raised only the issue of the validity of that portion of Order No. 26096 which fixed a minimum price for sales of residue gas to an interstate pipeline company made at the outlet side of a gasoline plant after gathering and processing had been completed. By this appeal Phillips seeks to attack the wellhead portion of Order No. 26096 thereby raising wholly new and foreign issues which have never been a part of this litigation. Phillips states as one of its propositions that it is questioning whether the Oklahoma Supreme Court has properly complied with this Court's orders. It is true that, if issues germane to this proposition were actually presented, this Court should consider such issues. However, examination of Phillips' Jurisdictional Statement filed on this appeal reveals that Phillips makes the assertion of the failure to comply with this Court's orders merely as a point of departure from which it hopes to persuade this Court to hear the new issues with which Phillips at this late date seeks to attack the wellhead portion of Order No. 26096. Not one sentence of Phillips' Jurisdictional Statement complains of the manner in which the Oklahoma Supreme Court dealt with that portion of Order No. 26096 which affected the sales of residue gas forming the sole issues in these cases. Phillips' attack here is not based upon the Oklahoma Supreme Court's failure to comply with the orders of reversal

of this Court but is in fact based upon the refusal of the Oklahoma Supreme Court to go beyond the orders of this Court and beyond the issues presented in this litigation. This appeal should be recognized for what it is, an attempt to raise new issues by an attack on the wellhead portion of Order No. 26096.

This appeal brings up for revision nothing but the proceedings subsequent to this Court's mandates on the first appeals and does not afford Phillips the opportunity to reopen these cases to new issues which might have been but were not raised in the initial appeals to the Oklahoma Supreme Court and the initial appeals to this Court. This Court clearly expressed this rule in the case of *United States* v. *Juan Pedro Camou*, 184 U.S. 572, 22 Sup. Ct. 505, 506, 46 L. Ed. 694, 695 (1901), when it stated:

> "Upon this second appeal we have only to consider whether the court of private land claims reached its final decree in due pursuance of the previous opinion and mandate of this court. The decision there made is the law of the case, and is not open for reconsideration in the subsequent appeal. This subject was recently considered in *Illinois ex rel. Hunt* v. *Illinois C. R. Co.*, 184 U.S. 77, *ante*, p. 300, 22 Sup. Ct. Rep. 300, and it was there shown that it is the settled law of this court that, after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out, it bring up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or examined on the second. To allow a second writ of error or appeal to a court of last resort on the same

questions which were open to dispute on the first would lead to endless litigation."

See also *United States* v. *New York Indians*, 173 U.S. 464, 19 Sup. Ct. 487 (1899); *Thompson* v. *Maxwell Land Grant and R.R. Co.*, 168 U.S. 451, 18 Sup. Ct. 121 (1897); *Stewart* v. *Solomon*, 97 U.S. 361, 24 L. Ed. 1044 (1878).

That the wellhead-portion of the Order was not in issue before the Supreme Court of Oklahoma is clearly shown by the statement made in that Court's opinion, *Natural Gas Pipeline Co.* v. *Corporation Commission*, 272 P.2d 425, 432 (Okla. 1954), where it states:

"All parties concede that under the cases cited above the Commission can fix the price of gas *as taken from the structure*" (Emphasis ours).

It is made equally clear by their Statements as to Jurisdiction filed in this Court that the parties in the original appeals to this Court did not raise in issue the validity of the wellhead portion of Order No. 26096. The Statement as to Jurisdiction filed jointly in Cases Nos. 320 and 321 at page 4 specified the questions presented to this Court as follows:

"1. Whether the Corporation Commission of Oklahoma has the power, consistently with the Commerce Clause of the Constitution of the United States (Art. I, Sec. 8, Cl. 3) and the Natural Gas Act (15 U.S.C. 717, *et seq.*), to *fix the price of residue gas* sold at the outlet of a gasoline plant to an interstate pipeline company for immediate transportation to markets in other states, or to prohibit the production of natural gas if the price fixed for *residue gas obtained* therefrom is not obtained.

"2. Whether, *as applied to Michigan-Wisconsin*, the Commission's order fixing the price of *residue gas* sold in Texas is an attempt to exercise extraterritorial jurisdiction and violative of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

"3. Whether, *as applied to appellants*, the Commission's order is arbitrary and unreasonable and abrogates private contracts for no public purpose, contrary to the Due Process Clause of the Fourteenth Amendment and the Contract Clause (Art. I, Sec. 10) of the Constitution of the United States" (Emphasis ours).

The Statement as to Jurisdiction in Cause No. 322 at page 4 specified the questions presented to this Court as follows:

"1. Whether the Order of the Corporation Commission of Oklahoma, fixing the price of *residue gas*, as applied to the operations of appellant in purchasing such *residue gas* at wholesale in the State of Texas for immediate and continuous flow through its interstate pipeline system to markets in other states, violates the Commerce Clause of the Federal Constitution.

"2. Whether the Order of the Commission as applied to appellant's purchase of *residue gas* in the State of Texas is an unlawful attempt to exercise extraterritorial jurisdiction by the Oklahoma Commission in the State of Texas in violation of the Fourteenth Amendment to the Federal Constitution.

"3. Whether the Commission's Order fixing the price of *residue gas*, as applied to the operations of appellant, is in violation of the Fourteenth Amend-

ment to the Federal Constitution by taking the property of appellant and giving it to another (Phillips Petroleum Company) without due process of law and without a justifying public purpose or reciprocity of advantage, and in denying to appellant the equal protection of the law.

"4. Whether, as applied to appellant, the Commission's Order fixing the price of *residue gas* impairs the obligations of appellant's subsisting contract with Phillips Petroleum Company in violation of the Contract Clause of the Federal Constitution (Art. I, Sec. 10)." (Emphasis ours).

Phillips itself recognized that the wellhead portion of the Order was not in issue in these cases when it stated at page 10 of its Motion to Dismiss in Cases Nos. 320, 321 and 322 (October Term, 1954) that:

> "All are agreed that under the decisions of the Oklahoma Supreme Court and this Court in the *Cities Service* and *Phillips* cases, *supra*, the State of Oklahoma, acting through the Corporation Commission, has the authority to prescribe the minimum price *a producer must realize* as a condition to production of the gas, even though the gas when produced moves directly in interstate commerce. The regulation is of the production, not of the sale.";

and when it stated at page 3 of its said Motion to Dismiss that:

> "Appellants did not below and do not here question the validity of the 7¢ order nor the decision of this court sustaining the same."

The 7-cent order to which Phillips had reference was that order of the Oklahoma Corporation Commission fixing a

minimum price of 7 cents per m.c.f. at the wellhead for gas produced from the Guymon-Hugoton Field in Texas County, Oklahoma, which was upheld by this Court in the case of *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U.S. 179, 71 Sup. Ct. 215 (1950). The wellhead portion of Order No. 26096 is, except for the amount of the minimum price, virtually identical with said 7-cent order.

Since the invalidity of the wellhead part of the Order was not urged in the original appeals in either the Oklahoma Supreme Court or this Court, the question may not properly be raised at this time. In *Walters* v. *City of St. Louis, Mo.*, 347 U.S. 231, 233, 74 Sup. Ct. 505, 507, 98 L. Ed. 660 (1954), it was stated:

> "Of course, we will not undertake to review what the court below did not decide."

And in McGoldrick v. *Compagnie Generale Transatlantique*, 309 U.S. 430, 434-435, 60 Sup. Ct. 670, 672-673, 84 L. Ed. 849 (1940), this Court said:

> "But it is also the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in *cases coming from the federal courts*, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below. *Blair* v. *Oesterlain Co.*, 275 U.S. 220, 225, 48 S. Ct. 87, 88, 72 L. Ed. 249; *Duignan* v. *United States*, 274 U.S. 195, 200, 47 S. Ct. 566, 568, 71 L. Ed. 996. In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial

> action we are called upon to review. Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to State courts requires us to decline *to consider and decide questions affecting the validity of state statutes not urged or considered there*. It is for these reasons that this Court, where the constitutionality of a statute has been upheld in the state court, consistently refuses to consider any "grounds of attack *not raised or decided in that court*". (Emphasis ours).

This Court has long and consistently held that it will not consider questions on appeal if they were not raised in the state courts. *Congress of Industrial Organizations* v. *McAdory*, 325 U.S. 472, 65 Sup. Ct. 1395 (1945); *New York ex rel. Cohn* v. *Graves*, 300 U.S. 308, 317, 57 Sup. Ct. 466, 469, 81 L. Ed. 666 (1937); *Whitney* v. *California*, 274 U.S. 357, 362-363, 47 Sup. Ct. 641, 643-644, 71 L. Ed. 1095 (1926); *Keokuk & Hamilton Bridge Co.* v. *Illinois*, 175 U.S. 626, 633, 20 Sup. Ct. 205, 208, 44 L. Ed. 299 (1900); *Dewey* v. *Des Moines*, 173 U.S. 193, 19 Sup. Ct. 379, 43 L. Ed. 665 (1899).

Phillips seeks to have this Court now decide, as a by-product of this case and after this case has been litigated through both the Supreme Court of the State of Oklahoma and this Court, a question which it did not raise in the original appeals to the Oklahoma Supreme Court and to this Court and yet a question which involves matters of tremendously vital consequence to the entire natural gas industry. Phillips asks this Court to decide at this time, in this casual manner and in a case where the question has

not been properly raised or the necessary facts for a decision included in the record, the questions (1) of whether sales of natural gas by independent producers at the wellhead are sales in interstate commerce for resale for ultimate public consumption, if the gas ultimately crosses a state line, and (2) of whether, if such sales are in interstate commerce for resale for ultimate public consumption they are within the production and gathering exemption of Section 1(b) of the Natural Gas Act, 15 U.S.C.A. 717(b). Indeed Phillips in its Jurisdictional Statement filed on this appeal appears to assume that it is settled that such sales are sales in interstate commerce and are not within the production and gathering exemption; yet we have been unable to find any case, and we submit that there is none, so holding with respect to such sales. Appellee does not admit that sales of gas at or near the wellhead are sales in interstate commerce. If such sales are in interstate commerce, then appellee does not admit that they are not covered by the production and gathering exemption contained in Section 1(b) of the Natural Gas Act.

Being confined as it is to factual situations involving exclusively sales of residue gas from gasoline plants, that is, sales made after production, gathering and processing have been completed, the record presented to this Court in the prior appeals can hardly be said to afford an adequate basis for passing on whether wellhead sales are sales in interstate commerce for resale or whether such sales are covered by the production and gathering exemption. In the case of *Hughes* v. *Wendel*, 317 U.S. 134, 63 Sup. Ct. 103 (1942), this Court stated that when the record is inade-

quate to determine questions sought to be raised, the appeal must be dismissed.

Cases presenting these points on adequate factual records are pending in the United States Court of Appeals for the Fifth Circuit on appeal from the Federal Power Commission. For example, *Deep South Oil Co.* v. *F.P.C.*, No. 15849; *Shell Oil Company* v. *F.P.C.*, No. 15900; and *Humble Oil and Refining Company* v. *F.P.C.*, No. 15884, all involve the question of whether wellhead sales constitute interstate commerce and, if so, whether such sales are exempt under the production and gathering exemption. These cases are awaiting disposition, having been argued on April 8, 1957. The Federal Power Commission is a party to those cases. So are independent producers whose rights would be radically affected if Phillips' unwarranted assumptions were to be indulged in here. The parties are not, under the circumstances, appropriate parties to litigate those issues. Whatever decision may be applicable to those issues, it ought to be established in cases dealing directly with those issues rather than with them incidentally. The record in this case deals only with residue sales made after production, gathering and processing have ceased. How can it be argued that this record provides an adequate basis for decision on issues relating to wellhead sales?

Phillips attempts to conjure up a conflict between the Regulations of the Federal Power Commission and Order No. 26096 as applied to wellhead sales. In doing so, it asks the Court to take judicial notice of the 174 series of orders adopted by that Commission. It should be noted that the 174-orders merely apply to sales of natural gas in inter-

state commerce for resale without in anywise attempting to determine whether wellhead sales of gas which ultimately crosses a state line are sales of gas in interstate commerce for resale, and, if so, whether such sales are covered by the production and gathering exemption. Those questions were reserved by the Commission for determination in individual cases on factual records. They are still in the process of being decided.

Not knowing whether wellhead sales would ultimately be held by the Commission and the courts to be sales of gas in interstate commerce for resale and, therefore, subject to the jurisdiction of the Federal Power Commission unless they fall within the production and gathering exemption, the independent producers filed their wellhead contracts with the Federal Power Commission under protest, reserving the right to contest its jurisdiction in the hearings relating to the issuance of Certificates covering such sales. Under the circumstances, the producers could hardly have done otherwise. As this Court is fully aware, appeals taken from and suits in equity attacking, among other things, the 174-orders insofar as wellhead sales were concerned, were held in several cases to be premature. Being at that time unable to litigate the question whether wellhead sales were in interstate commerce or were exempt as a part of production and gathering, the independent producers had the unhappy choice of either filing on such sales or of running the risk of violating not only the Commission's Regulations but the Natural Gas Act itself. Violations of either would subject a producer who guessed incorrectly what the law was to fines and other penalties quite onerous in character.

Judicial notice will disclose that the Federal Power Commission regulations provided that with respect to each sale of gas covered by them the price in effect on June 7, 1954, the date of the decision in *Phillips v. Wis., supra*, was the contract rate applicable under the Natural Gas Act to such sale until it was changed as provided in that Act. On June 7, 1954, the price being collected by independent producers for wellhead sales to Phillips and others in the Guymon-Hugoton Field of Oklahoma was 9.8262 cents at 14.65 psia. Consequently the producers in compliance with the 174-orders filed that price with the Federal Power Commission as their June 7, 1954 price. In every instance the Commission in writing accepted such filing and advised the producer involved to that effect. All of this is well-known to Phillips because the Regulations required the producers to serve Phillips with copies of their filings where Phillips was the purchaser.

The foregoing demonstrates that, even if the Federal Power Commission is ultimately held to have jurisdiction over wellhead sales of gas which ultimately crosses a state line and it is also held that such sales are not covered by the production and gathering exemption, the fact remains that there is no conflict between the Regulations of the Federal Power Commission and Order No. 26096 insofar as such sales are concerned. Furthermore a decision in these cases that Order No. 26096 is invalid as applied to wellhead sales would still leave 9.8262 cents as the price applicable to such sales under the Regulations of the Federal Power Commission. It is therefore obvious that this appeal can in fact accomplish nothing.

The wellhead portion of Order No. 26096 is, except for the amount of the minimum price, identical to that order fixing a minimum price for sales of gas at the wellhead in the Guymon-Hugoton Field of Oklahoma which was upheld by this Court in the case of *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U.S. 179, 71 Sup. Ct. 215 (1950). This Court held in that case that it is undeniable that a state may adopt reasonable regulations to prevent economic and physical waste of natural gas and that the minimum wellhead price order of the Oklahoma Corporation Commission there under consideration was lawful since it was substantially related to a legitimate end sought to be attained. This Court then held the minimum wellhead price valid stating at page 220:

> "Insofar as conservation is concerned, the national interest and the interest of producing states may well tend to coincide. In any event, in a field of this complexity with such diverse interests involved, we cannot say that there is a clear national interest so harmed that the state price-fixing orders here employed fall within the ban of the Commerce Clause."

The action which Phillips now asks this Court to take would require that the *Cities Service* case be overruled, a step which this Court did not take in its original decisions in this case and its companion cases. This Court found merely that the *Cities Service* case was not applicable to this case. The *Cities Service* case did not apply here because sales of residue gas at the outlets of gasoline plants after production, gathering and processing had ceased were all that were here involved. Now when Phillips is attempting to enlarge the issues and to strike down that por-

tion of Order No. 26096 dealing with a minimum price for natural gas sold at the wellhead, the *Cities Service* case stands squarely in its path proclaiming that the wellhead portion of Order No. 26096 is a proper exercise of the State of Oklahoma's police power legitimately directed toward the conservation of one of its precious natural resources.

If this Court should overrule the *Cities Service* case such action would seriously jeopardize the power of the State of Oklahoma to take reasonable measures for the conservation of its valuable resource, natural gas. The position which Phillips now takes, if upheld by this Court, might also, through an extension of the rule stated in *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157, 74 Sup. Ct. 396 (1954), place in jeopardy the gross production tax which the State of Oklahoma levies upon the production of natural gas within the State of Oklahoma.

Proposition II.

The position previously taken by Phillips with respect to this litigation and to Order No. 26096 estops Phillips from urging the issues which it now seeks to raise and such issues are accordingly not properly raised.

Order No. 26096 follows virtually verbatim the form of order which Phillips prepared and submitted to the Oklahoma Corporation Commission. The substantial role which Phillips played in the hearings before the Oklahoma Corporation Commission is described in the dissenting opinion in the original appeal of these cases to the Oklahoma Su-

preme Court, *Natural Gas Pipeline Co.* v. *Corporation Commission*, 272 P.2d 425 (Okla., 1954), where at page 437 it was noted:

> "The record reveals that before the last of the protracted series of hearings in this case the Commission, through its Chairman and its attorney, expressed grave doubt, or at least serious misgivings, as to whether a price-fixing order for anything but raw gas at the wellhead could be legally or constitutionally justified as a conservation measure. This makes it doubly surprising and somewhat imponderable to find that after delaying its decision several days after the last hearing, the Commission, on the basis *of the weak and biased evidence presented by no other company than Phillips, signed substantially the same kind and form of order that Phillips' attorneys had previously drawn and exhibited to the Commission earlier in the hearings*" (Emphasis ours).

The position Phillips took in the hearings can be appreciated by noting that its suggested form of order was followed by the Oklahoma Corporation Commission. Phillips cannot, now that it is dissatisfied therewith, assail the results of its own action. This Court stated the applicable rule in *United Fuel Gas Co.* v. *R.R. Commission of Ky.*, 278 U.S. 300, 307-308, 49 Sup. Ct. 150, 152 (1929), as follows:

> "But this objection, and that as well to the constitutionality, on state grounds, of the statute creating the commission and defining its powers, are not available to appellants in the present suit. It is the rule of this court, consistently applied, that one who has invoked action by state courts or authorities under state statutes may not later, when dissatisfied with the result, assail their action on the theory that the statutes

under which the action was taken offend against the Constitution of the United States. *Wall* v. *Parrot Silver & Copper Co.*, 244 U.S. 407, 37 S. Ct. 609, 61 L. Ed. 1229; *Electric Co.* v. *Dow*, 166 U.S. 489, 17 S. Ct. 645, 41 L. Ed. 1088; *Eustis* v. *Bolles*, 150 U.S. 361, 14 S. Ct. 131, 37 L. Ed. 1111; *Hurley* v. *Comm. of Fisheries*, 257 U.S. 223, 42 S. Ct. 83, 66 L. Ed. 206; *St. Louis Malleable Casting Co.* v. *George C. Prendergast Co.*, 260 U.S. 469, 43 S. Ct. 178, 67 L. Ed. 351. Upon like principle we think that appellants who have procured action by a state commission under a state statute may not assail that action in a federal court of equity on the ground that that statute, or the one creating the commission, is void under the State Constitution."

The record shows that when the original appellants in these cases took their appeals to the Oklahoma Supreme Court and then to this Court in an attack on that portion of Order No. 26096 which fixed a minimum price for sales of residue gas to those appellants, Phillips fought to establish the constitutionality of the questioned portion of the order. During these appeals all parties, including Phillips, agreed that the case of *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U.S. 179, 71 Sup. Ct. 215 (1950), established conclusively the authority of the Oklahoma Corporation Commission to issue an order fixing a minimum price at the wellhead for gas and Phillips used this unquestioned fact as a basis from which, by arguments which this Court found unpersuasive, to reason that the Oklahoma Corporation Commission also had authority to fix a minimum price for sales of residue gas made directly into an interstate pipeline after production, gathering and processing had ceased. For example Phillips at page 12 of its Motion to

Dismiss in Cases Nos. 320, 321 and 322 (October Term, 1954) states:

> "Thus, what was said by this Court in *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U.S. 179, and *Phillips Petroleum Co.* v. *State of Oklahoma*, 340 U.S. 190, in regard to the validity of the 7¢ order under the Commerce clause of the Federal Constitution is equally applicable and conclusive in this case and leaves no room for further argument."

The *Cities Service* case did not apply in the original appeals in these cases because the sales of residue gas to the original appellants were all that were involved. The *Cities Service* case is controlling of the issues as to the wellhead portion of Order No. 26096 which Phillips here seeks to raise; yet Phillips now wishes to withdraw entirely from the uncontested basic premise upon which it tried to fashion a defense for the residue portion of Order No. 26096. Likewise Phillips used other arguments in the original appeals in these cases which, while inapplicable to the residue sales then being considered, are applicable and persuasive as to the wellhead portion of the Order which Phillips now seeks to raise in issue. For example, in its Jurisdictional Statement (October Term, 1956) Phillips states that the Oklahoma Supreme Court has ignored completely the decision of this Court in *Phillips Petroleum Co.* v. *Wis.*, 347 U.S. 672, 74 Sup. Ct. 794 (1954). Phillips' own arguments made on former appeals when applied to the wellhead portion of Order No. 26096 ably refute such a contention. Phillips, in its Motion to Dismiss in Cases Nos. 320, 321 and 322 (October Term, 1954) stated at page 16:

"This Court in *Phillips Petroleum Co.* v. *State of Wisconsin*, 347 U.S. 672, (pending on petitions for rehearing) held that sales of gas for resale in interstate commerce by producers and gatherers are subject to the jurisdiction of the Federal Power Commission under the Natural Gas Act. The Court, however, did not in that case in any way take from or limit the recognized jurisdiction and authority of the states to regulate the physical production of gas in the interest of conservation or of any other consideration of legitimate local concern.

"As recognized by this Court in the cases of *Cities Service Gas Co.* v. *Peerless Oil & Gas Co.*, 340 U.S. 179, and *Phillips Petroleum Co.* v. *State of Oklahoma*, 340 U.S. 190, the Oklahoma minimum gas price orders constitute an authorized regulation of production by the state. Although the orders may affect the price of the gas, they are a regulation of production and not a regulation of the sale.

"Being a valid regulation of production by the state, then under Section 1b of the Natural Gas Act and under the holding of this Court in *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498; *Interstate Natural Gas Co.* v. *Federal Power Commission*; 331 U.S. 682; *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, it is unaffected by the Natural Gas Act or any regulation of the Federal Power Commission thereunder.

"This is particularly true in the absence of any conflicting regulation by the Federal Power Commission under the Natural Gas Act, as is presently the case. There is in effect no order or regulation by the Federal Power Commission which would indicate that it will not allow producers and purchasers of gas affected by the 9.8262¢ minimum price order to include in their

rate base the minimum price so prescribed by such order."

When Phillips elected to participate in the original appeals in these cases as an appellee defending the validity of the residue portion of Order No. 26096, it thereby waived any and all objections which it might have had to Order No. 26096 or any part thereof. See *Wall* v. *Parrot Silver & Copper Co.*, 244 U.S. 407, 37 Sup. Ct. 609 (1917). Phillips who chose to defend Order No. 26096 now attacks it. This it cannot do for Phillips cannot rely on the order for one purpose and then assail it for another in the same proceeding. See *Hurley* v. *Commissioner of Fisheries of Va.*; 257 U.S. 223, 42 Sup. Ct. 83 (1921).

In summary, Phillips is now attacking the validity of Order No. 26096, (1) after it submitted to the Oklahoma Corporation Commission the form of order which was finally adopted as Order No. 26096; (2) after it has fought to sustain the validity of said Order against an attack on the residue portion thereof in the original appeals to the Oklahoma Supreme Court, and then to this Court; and (3) after it has presented arguments during said original appeals which, it is submitted, effectively concede that all parties were agreed as to the validity of that portion of Order No. 26096 which Phillips now attacks. We submit that Phillips cannot at this late date so reverse itself and that Phillips by its actions has waived all objections to Order No. 26096. Inasmuch as Phillips is estopped from questioning the validity of Order No. 26096, this appeal presents no questions which have been properly raised and we respectfully submit that it should be dismissed. See

also *Shepard* v. *Barron*, 194 U.S. 553, 24 Sup. Ct. 737 (1904); *St. Louis Malleable Casting Co.* v. *George C. Prendergast Construction Co.*, 260 U.S. 469, 43 Sup. Ct. 178 (1923).

Proposition III.

The Orders of the Oklahoma Supreme Court from which Phillips seeks to appeal rest on an adequate non-federal basis.

As has been previously pointed out, the only question which is now before this Court is whether the Oklahoma Supreme Court correctly followed the orders of reversal of this Court. This Court by its orders of April 11 and April 18, 1955, invalidated that portion of Order No. 26096 which fixed a minimum price for the original appellants' purchases of residue gas. This must necessarily be the effect of this Court's orders, since this Court had no other issues before it. After this Court's orders it remained for the Supreme Court of Oklahoma to follow the orders of this Court regarding residue sales and to determine the purely state question of whether the invalidation of Order No. 26096 as to sales of residue gas required that the wellhead portion of Order No. 26096 also be declared to be invalid. The Oklahoma Supreme Court fully complied with this Court's orders and held invalid the residue portion of Order No. 26096, and it also held in effect that the various portions of Order No. 26096 were separable and that the decision invalidating the residue portion of Order No. 26096 did not invalidate the wellhead portion of the Order. Such orders gave full effect to the decision of this Court while at the same time effectuating the determination of the

Oklahoma Supreme Court with respect to the purely state question of the separability of Order No. 26096. This Court held that the question of the separability of a state statute is one for the state court in the case of *Dorchy* v. *State of Kansas*, 264 U.S. 286, 44 Sup. Ct. 323, 325 (1924), where it stated:

> "The task of determining the intention of the state legislature in this respect, like the usual function of interpreting a state statute, rests primarily upon the state court. Its decision as to the severability of a provision is conclusive upon this Court."

In *Aero Mayflower Transit Co.* v. *Board of R.R. Commissioners of State of Mont.*, 332 U.S. 495, 499-500, 68 Sup. Ct. 167, 169, 92 L. Ed. 99 (1947), this Court pointed out:

> "The rule is too well settled to permit of question that this Court not only accepts but is bound by the construction given to state statutes by the state courts" (Citing many cases).

Thus we submit that the determination of the Oklahoma Supreme Court that this Court's order invalidating the residue portion of Order No. 26096 did not require the invalidation of the entire order is not subject to review by this Court, since such determination rests on an adequate non-federal basis.

CONCLUSION

We respectfully submit, therefore, that for the reasons above set forth this appeal of Phillips should be dismissed.

Respectfully submitted,

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Attorney for Appellee, the Corporation Commission of the State of Oklahoma.

May, 1957.

APPENDIX

APPENDIX "A"

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

PANHANDLE EASTERN PIPE LINE COMPANY, *Plaintiff in Error*	)	
v.	)	No. 35,734
THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, ET AL., *Defendants in Error*	)	

ORDER

NOW on this ..... day of June, 1955, it appearing that on the 18th day of April, 1955, the Supreme Court of the United States reversed the judgment of this court rendered on the 27th day of April, 1954, and that the mandate and opinion of that court have been received and filed by the Clerk of this court,

NOW, THEREFORE, in conformity with the mandate and opinion of the Supreme Court of the United States, it is ordered as follows:

1. That the mandate heretofore issued from this court to the Corporation Commission of the State of Oklahoma, be recalled and vacated.

2. That a copy of this order and a copy of the opinion of the Supreme Court of the United States heretofore received and filed in this cause, together with proper mandate of this court, be forthwith transmitted to the Corporation Commission of the State of Oklahoma.

3. That Order No. 26096 of the Corporation Commission of the State of Oklahoma, which is the subject of the

appeals to this court and the Supreme Court of the United States, be and the same is hereby reversed, set aside and held for naught insofar as sales of residue gas by Phillips Petroleum Company and its successors, to Panhandle Eastern Pipe Line Company under existing gas purchase contracts are concerned.

4. That plaintiff in error recover its cost as set forth in the mandate of the Supreme Court of the United States in the amount of $100.00.

Chief Justice